Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

LYNN STUTER, BYRD STUTER and MONICA STUTER,

*Petitioners,*

*v.*

STEVENS COUNTY SHERIFF DEPARTMENT,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1) Does this Supreme Court's decision in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) preclude municipal liability under 42 U.S.C. § 1983 if a citizen exercising First Amendment expression seeks police protection against criminal harassment directed at the citizen for the exercise of those rights, and law enforcement's response not only fails to protect constitutional rights, but increases the danger to the citizens for exercising said rights?

2) Does this Supreme Court's ruling in *DeShaney v. Winnebago County Dept. of Social Services*, alter this court's longstanding holdings in *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978), and *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989), which allow for 42 U.S.C. § 1983 liability against a municipality where that municipality's policy of inaction results in deliberate indifference to, and failure to protect, constitutional rights of citizens with whom law enforcement comes into contact?

3) If an affirmative municipal policy of non-enforcement of criminal law against criminal perpetrators is evidenced, while law enforcement simultaneously limits a citizen from protecting themselves from harassors, may a citizen claim a due process violation and damages under 42 U.S.C. § 1983?

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Appendix 7a-24a - Memorandum Opinion of the United States District Court for the Eastern District of Washington, granting In part Defendant's Motion For Summary Judgment dated March 9, 2004 and filed March 12, 2004

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## OPINIONS AND ORDERS ENTERED BELOW

The unreported decision of the United States Court of Appeals for the 9th Circuit was entered May 12, 2006. *Petitioner's Appendix ("Pet.App") 3a-6a.* The decision and its attendant judgment, *Pet.App. 1a-2a,* affirmed a June 9, 2004 dismissal on summary judgment of the above matter by the United States District Court for the Eastern District of Washington. *Pet.App. 25a-63a.* The latter dismissal followed a March 9, 2004 Memorandum Opinion and Order granting Defendant's motion for partial summary judgment. *Pet.App. 7a-24a.*

## STATEMENT OF JURISDICTION

The United States Court of Appeals decision was filed May 12, 2006. *Pet.App. 1a.* This court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**U.S. Const. Amend. I**:

**Freedom of Religion, Speech and Press; Peaceful Assemblage; Petition of Grievances.**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**U.S. Const. Amend. XIV:**

**Section 1.** * * *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 **Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...* * *

## STATEMENT OF THE CASE

This case involves a 42 U.S.C. § 1983 complaint filed by a Plaintiff family, Lynn, Byrd and Monica Stuter, against the Defendant Stevens County's Sheriff's Department for the department's refusal to properly address ongoing, open, public criminal harassment of the Plaintiff family, whose outspoken views on educational funding (verses athletics funding) were widely known in the community, by groups of local teenagers over a period of

years. *Pet.App. 67a et seq., including 79a, para. 59.* Plaintiffs' complaint alleges that the Defendant Department violated Plaintiffs' First Amendment constitutional rights by alleged conspiracy with third party criminal harassors, and/or alleged due process violations through the Department's failure to train its deputies which amounted to deliberate indifference to Plaintiffs' constitutional rights, and for law enforcement action which itself affirmatively increased the third party danger to Plaintiffs.

The evidence at summary judgment established that from 1994 through the filing of this complaint in August 2002, groups of teenagers increasingly harassed and punished Plaintiffs for the Plaintiff mother's outspoken views of educational reform, including educational funding verses athletic funding.[1] *See e.g. Pet.App. 69a-70a.* Plaintiffs received much negative community feedback regarding their views. *Pet.App. 70a, para. 7.* The Plaintiff mother and her family consistently called the Defendant Sheriff's Department for protection. *Pet.App. 71a.* Over the years, the Defendant Sheriff's Department responded, but the

[1] The forms of harassment engaged in by the teenagers against the family are identified only in part in the Trial Court's order of June 9, 2004. *Pet.App. 30a-38a.* Evidence was that the teenagers' harassment grew over the years from eggs and pumpkins thrown at the house in 1994, to cars driving past the house yelling obscenities, to, by 1997, explosives thrown onto Plaintiffs' lawn, teenagers shooting reams of paint balls at the house from cars, teenagers sneaking up to the back of the Plaintiff's house through the woods at night to paintball the home while the family slept, bricks thrown at the home, cars of teenagers driving by in the middle of the night, honking and shouting obscenities, four wheel drive vehicles with "glass pack pipes" driving off the roadway onto the grass in front of the family home tearing up the median, and by 1999, M-70 firecrackers thrown onto the property, having been taped to eggs to allow for more distance. These actions went on through the year, with the "road rallies" identified *infra* occurring on a predictable basis.

Department did not criminally cite teenagers, or warn any of them of the potential for such action.

The most public displays of harassment towards Plaintiffs were annual homecoming day "road rallies," where cars full of unruly teenagers would drive through the local community before jamming up the roadway in front of the Plaintiffs' home for up to 45 minutes, honking, exposing themselves, shooting paintballs, yelling obscenities, and attempting to threaten and intimidate the Plaintiffs with property damage and physical harm. *See e.g. Pet. App. 72a.* The Defendant Department was made aware of these rallies in advance, and often had patrol cars cruising or parked in the area. While Defendant deputies would tell teenagers to "go home" at some point, and break up the rallies, no criminal citations or warnings issued. Ultimately, in the year 2000, the Department handed out traffic infractions for illegal u-turns made by the teenagers during their harassment of Plaintiffs. *Pet.App. 78a, para. 54(e), 79a, para. 58.*

Plaintiffs felt terrorized in their own home. *Pet. App. 74a, para. 31.* When Plaintiff Lynn Stuter requested that more be done, Defendant Deputies characterized the teenagers' harassing actions toward the family as "free speech." *Pet.App. 74a, para. 33.* Plaintiffs alleged that law enforcements' presence, combined with its inadequate and ratifying behavior, increased, prolonged and perpetuated the danger to the Plaintiffs. *See Pet.App. 78a, para. 55, 81a, para. 68, 84a, para. 80.* And in fact, over the years, while the Department was responding to Plaintiffs continued calls, the criminal harassment became so pervasive as to become a high school tradition. Evidence was taken from former harassors—now adults—attesting that underclassmen were

required to participate in the harassment of the family as part of the tradition.

Because of department failure to quell the criminal activity against them, Plaintiffs nearly ceased public advocacy. *Pet.App. 75a, para. 35.*

Evidence produced by Plaintiffs indicated that local deputies had gone to the same small school as the harassers, and knew some of the harassers personally. On at least one middle-of-the-night police stop of a vehicle which had been reported by Plaintiffs to have just participated in harassment, and was near the Plaintiff's home, the suspect teenagers in the vehicle were not even identified by name in the accompanying police report, contrary to police procedure.

A Plaintiff's expert attested that Defendant's actions fostered the environment created, allowed it to continue, and failed to protect the Plaintiffs through the years.

On the "Homecoming" night of Sept. 29, 1999, after some years of being the victims of harassment and annual "road rallies," Plaintiff Lynn Stuter positioned her vehicle to block the roadway in front of her home. She then stood in the roadway with a shotgun to prevent the teenagers from driving down her street. *Pet.App. 77a-78a; 33a-34a (Order).* She was promptly confronted by Defendant sheriff's deputies, and ordered off the roadway. Defendant deputies requested charges against Plaintiff for criminal disorderly conduct. *Pet.App. 34a (Order).* The harassment of the Plaintiffs thereafter continued. *Pet.App. 34a-38a (Order).*

In 2002, the Plaintiff family brought a claim under 42 U.S.C. § 1983 asserting that the Defendant law enforcement in Stevens County acting under color of statute, had engaged in a policy of inaction, i.e. a municipal policy of failure to train, which amounted to a failure to protect Plaintiffs' constitutional rights in deliberate indifference to their constitutional rights. *See Pet.App. 68a, 80a-81a, paras. 66-68, 71, 83a.* Plaintiffs alleged that the nature of Defendant's actions and inaction increased and prolonged the danger to the Plaintiffs. *See e.g. 78a, para. 55. Pet.App. 26a-27a (Order).* Plaintiffs also claimed that deputies acted intentionally in alignment with third party actors (framed as retaliation, but clarified as conspiracy) *Pet.App. 26a. (Order).*

The District Court dismissed the Plaintiffs' claim on summary judgment. *Pet.App. 26a et seq.* Citing this Supreme Court's decision in *DeShaney v. Winnebago County Dept. of Social Services*, 489 US 189 (1989), the District court held that, 1) as to action under color of law, the Defendant Sheriff's Department did not create the harassment, and that a theory of "insufficient response making (Plaintiffs) more vulnerable is foreclosed under *DeShaney*;" 2) as to the alleged failure to protect resulting from municipal policy, no municipal policy was shown by a failure to act, per *Deshaney*; and 3) Plaintiffs could not establish a due process violation through police failing to adequately respond or investigate, again, per *DeShaney. Pet.App. 42a, 52a-54a, 55a, 58a, 61a.*

On appeal to the Ninth Circuit, the Appellate court upheld the dismissal of the Plaintiffs' due process claim, also citing *DeShaney. Pet.App. 5a.* The Ninth Circuit Court held that, even if evidence existed of inadequate response by the

Defendant Department to complaints of harassment and vandalism, Plaintiffs had no right to protection from the acts of third parties. *Id.* The Ninth Circuit also concluded that the state created danger exception to the general rule in *DeShaney* did not apply, as the harassing activities predated involvement by the Defendant Department, and the "record is devoid of evidence that any affirmative action by the Department increased the danger posed to the Stuters" in the required manner. *Pet.App. 6a.*

The Ninth Circuit also dismissed the Plaintiffs' First Amendment claim, holding that, notwithstanding inadequate response, "there is no evidence that the Department's action (or inaction) was motivated by a desire to chill the Stuter's speech." *Pet.App. 5a.*

Plaintiffs, Petitioners herein, seek review by this United States Supreme Court of the dismissal of their claim on the grounds stated.

## REASONS FOR ALLOWANCE OF THE WRIT

The Ninth Circuit's holding has decided an important question of federal law arising from this Supreme Court's language in *DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189 (1989). And in doing so, it has entered a decision in conflict with the second Circuit's decision in *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993).

While *DeShaney* holds that there is no affirmative duty on the part of the state to protect citizens from third party actions, the opinion also provides for exceptions to this

rule—notably, where persons are in state custody, and cannot thus provide for themselves because of state limitations on their ability to act for themselves. But since *DeShaney*, the federal circuits have also considered, and have begun to evolve, a "state created danger theory." In this line of reasoning, law enforcement action which places people directly in harm's way, can create an affirmative duty of action on the part of the state, whereby 42 U.S.C. § 1983 liability can follow for failure to act in a manner which protects the citizens involved. And in 1993, in *Dwares*, 985 F.2d 94, the Second Circuit applied that state created danger theory to a situation where the police did not themselves originally place the citizen in harm's way, but where police oversaw, monitored and refused to assist a citizen, who was exercising First Amendment expression, from being assaulted by third parties. The court held such police acts to be affirmative acts, and to constitute ratification of criminal conduct, which increased the danger to the citizens targeted, and formed a proper basis of liability.

The Ninth Circuit's decision in this case refuses to apply this affirmative duty of the state to protect citizens under attack for their exercise of free speech. It holds that no basis for 42 U.S.C. § 1983 liability exists, and thus, no protection exists from criminal conduct directed against citizens exercising First Amendment rights. It does so on the premise that this court's *DeShaney* decision holds that insufficient response by law enforcement neither renders persons more vulnerable, nor establishes policy, nor establishes state action.

The Ninth Circuit Court's ruling so narrowly construes this Court's *DeShaney* decision as to remove any accountability for police agencies who intentionally refuse to protect citizens exercising first amendment rights from third party harassment. Thus, while sound policy and constitutional reasons exist for declining to impose 42 U.S.C. § 1983 liability for most good faith responses to crime calls which are deemed inadequate in retrospect, Petitioners here urge this court to address whether the evolving state created danger theory is sound, and if so, whether it must of necessity encompass liability for a law enforcement response which ratifies criminal conduct targeted at *rights* expression.

Absent such review, the Ninth Circuit's reading of the *DeShaney* decision holds that citizens exercising constitutional expression rights have no police protection, unless the local police feel like giving it to them.

## ARGUMENT

### 1. REVIEW IS WARRANTED TO RESOLVE THE ACCEPTANCE AND APPLICATION OF THE DANGER CREATION THEORY EXCEPTION TO *DESHANEY* WHERE STATE LAW ENFORCEMENT RATIFIES CRIMINAL BEHAVIOR AGAINST CITIZENS EXERCISING FREE SPEECH RIGHTS.

Petitioner here alleges that the Ninth Circuit's decision in this case is in conflict w[illegible] *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), and with numerous federal circuits in holding that an

affirmative duty to act on the part of the state only applies where the state itself "creates" the danger. It is likewise in conflict with a Second Circuit decision of *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993), whereby this danger creation theory discussed within the federal circuits has properly evolved to the level of state liability when state ratification of criminal behavior prolongs or increases third party danger to citizens who are then harmed by those third parties.

In *DeShaney,* 489 U.S. 189, this United States Supreme Court held that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause. [2] The Due Process Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. *Id.* at 195.

But this Supreme Court also held that, in certain limited circumstances, the Constitution *does* impose upon the State affirmative duties of care and protection with respect to particular individuals. *Id.* at 198. As an example, an affirmative obligation on the part of the state exists where a person is in state custody, and thus where a person's individual liberty is restrained by the state in a manner rendering that individual unable to care for himself. *Id.* at

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[2] This Court accepted review in 1989 of the failure to enforce issue "[B]ecause of the inconsistent approaches taken by the lower courts in determining when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights...and the importance of the issue to the administration of state and local governments..." *DeShaney,* 489 U.S. at 194.

198-199, citing, e.g. *Estelle v. Gamble,* 429 U.S. 97 (1976), and *Youngberg v. Romeo,* 457 U.S. 307 (1982). And the dissent in *DeShaney* also noted the existence of other specific exceptions to this "no affirmative duty" rule, including a situation whereby the state monopolizes a particular path of relief, or forecloses opportunities for citizens to exercise constitutional rights. Such scenarios may impose upon the state certain positive duties. *DeShaney,* 489 U.S. at 207, citing *Schneider v. State,* 308 U.S. 147 (1939); *Hague v. Committee for Indus. Org.,* 307 U.S. 496 (1939); *United States v. Grace,* 461 U.S. 171 (1983).

The dissent in *DeShaney* also pointed out that in *Shelley v. Kraemer,* 334 U.S. 1 (1948), and *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), the Supreme Court had also suggested that a State may be found *complicit* in an injury, even if it did not create the situation that caused the harm. *DeShaney,* 489 U.S. at 207 (Brennan, J., dissenting, Marshall, J., and Blackman, J., joining).

Since the *DeShaney* decision, the various federal circuits have attempted to address the nature and theory of these *DeShaney* "affirmative duty" exceptions—evolving such a duty into that arising from situations where the state itself creates danger to people with whom state agents come into contact. In an exemplary 1995 decision of *Mark v. Borough of Hatboro,* 51 F.3d 1137 (3d Cir. 1995), the Third Circuit Court found a consistency in "state created danger" cases. Such cases "have four things in common: (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (and) (4) the state actors used their authority to create an opportunity that otherwise would not

have existed for the third party's crime to occur." *Id.* at 1152-1153. While the *Mark* court failed to apply the theory to the case before it, the theory was later adopted by the Third Circuit in *Kneipp v. Tedder*, 95 F.3d 1199, 1211 (3d Cir. 1996).

By the time of the Ninth Circuit's decision in *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006), that court noted how the majority of circuits since the *DeShaney* decision had adopted the "state created danger" theory of affirmative duty as a basis for liability under 42 U.S.C. § 1983, indicating that the doctrine was "well established law in seven of our sister circuits." *Id.* at 1061, n. 1 citing *Butera v. District of Columbia,* 235 F.3d 637, 651 (D.C. Cir. 2001); *Dwares v. City of New York,* 985 F.2d 94, 98-99 (2d Cir. 1993); *Kneipp v. Tedder,* 95 F.3d 1199, 1201 (3d Cir. 1996); *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1066-67 (6th Cir. 1998); *Reed v. Gardner,* 986 F.2d 1122, 1125 (7th Cir. 1993); *Freeman v. Ferguson,* 911 F.2d 52, 54-55 (8th Cir. 1990); *Uhlrig v. Harder,* 64 F.3d 567, 572 (10th Cir. 1995).

The D.C. Circuit in *Butera* stated: "We join the other circuits in holding that, under the State endangerment concept, an individual can assert a substantive due process right to protection by the [District of Columbia] from third-party violence when [District of Columbia] officials affirmatively act to increase or create the danger that ultimately results in the individual's harm." 235 F.3d at 651. The interesting language in *Butera* is the court's inclusion within the affirmative duty borders of the state's actions in "increasing" the danger, not simply creating it.

The evolution seems subtle. In *Kennedy v. City of Ridgefield,* no danger existed from any third party until police got involved. Police then actively created danger where none existed by disclosing a report of molestation to the alleged molester. 439 F.3d at 1057. In *Butera,* police officers affirmatively used a citizen as an undercover operative, thus creating the danger to him. 253 F.3d at 641. In *Kallstrom v. City of Columbus,* the city disclosed personal information from undercover police officer's personnel files to counsel for alleged drug conspirators; again, actually creating the danger. 136 F.3d at 1059. And in *Uhlrig v. Harder,* an activity therapist was killed by a mental hospital patient after state mental health administrators eliminated a special unit in the mental hospital that had been reserved for criminally insane, and thereby caused the transfer of the killer to the general hospital population. 64 F.3d at 567.

But other Circuit decisions have held that the state need not create the danger to allow for liability.

In *Ross v. United States,* 910 F.2d 1422 (7th Cir. 1990), a plaintiff whose son drowned was held to have stated a viable § 1983 claim where an arbitrary county policy prevented private assistance and failed to provide state assistance. *Id., cited in Reed v. Gardner,* 986 F.2d at 1126. And in *Freeman v. Ferguson,* 911 F.2d 52 (8th Cir. 1990), the Eighth Circuit found viable a suit in which the state "played a part in the creation of the danger," and took actions which rendered the Plaintiffs more vulnerable to such danger. *Id.* at 54-55. In particular, it was alleged that a close relationship existed between the Police Chief and a perpetrator who killed a mother and daughter. It was claimed that the violence the decedents were subjected to was not solely the result of private action, but was also the result of

an affirmative act by a state actor to interfere with the protective services which would have otherwise been available in the community. Such interference was asserted to have increased the vulnerability of decedents to the actions of the perpetrator. "Without such affirmative actions on the part of the chief of police, the danger faced by the Downens would have arguably been less." *Id.* The *Freeman* court concluded that the precedent had not yet established the extent to which the government must increase the danger of private violence before it assumes a corresponding duty to protect. *Id.* at 55.

The question in this Stuter v Stevens County petition for a writ involves third party actors. But it also involves ongoing harm which the Defendant did not originally create, but which the Defendant viewed, supervised in some cases, and failed to address or remedy as criminal behavior. And under such supervision, the harassment continued and escalated. This matter also involves criminal activity targeted at the Plaintiffs for their outspoken educational views.

The only "state created danger" decision nearing the same fact pattern is that of second circuit decision in *Dwares*, 985 F.2d 94, where the Plaintiff sued city, police officers, and another individual for violation of their civil rights in connection with the beating of the plaintiff during a demonstration that involved flag burning. In *Dwares,* a complaint, brought principally under 42 U.S.C. §§ 1983, 1985(3), and 1986, alleged that the Defendant City of New York and individual police officers conspired with private individuals to permit those private individuals, without threat of intervention by defendant police officers, to assault *Dwares* and to prevent *Dwares's* exercise of his First Amendment rights. Citing *DeShaney,* the Second Circuit

identified that affirmative state action may increase a danger to a victim from third parties' criminal conduct by ratification of third party criminal acts. The case holds that police presence, and failure to act or intervene while crimes are being openly committed against persons engaged in free speech expression, constitutes inherent ratification of the criminal behavior, which thereby creates more danger and implicates rights. *Id.* The *Dwares* Court cited the Eighth Circuit decision in *Freeman v. Ferguson,* 911 F.2d at 52 as corroboration for the idea that police presence and refusal to enforce laws against violence equates to ratification, and thereby increases the danger posed to potential victims by its very nature.

The Second Circuit held as follows:

> "We read the *DeShaney* Court's analysis to imply that, though an allegation simply that police officers had failed to act upon reports of past violence would not implicate the victim's rights under the Due Process Clause, an allegation that the officers in some way had assisted in creating or increasing the danger to the victim would indeed implicate those rights."

*Dwares,* 985 F.2d at 99.

The Ninth Circuit's decision in this Plaintiff's case distinguished *Dwares* on its facts—holding that the *Dwares* facts differed in the police's implementation of ratification—but the distinction is one without a difference. In *Dwares,* the complaint alleged that officers conspired with "skinheads" to permit the latter to beat up flag burners, and assured the

skinheads that unless they got "totally out of control" they would not be impeded or arrested. *Dwares,* 985 F.2d at 99. The Second Circuit's opinion discusses such police commentary as permission or verbal license given by the officers, and noted that ratification also arguably occurred through at least one criminal action occurring in the presence of the officers, which did not result in interference by police or arrest. The Second Circuit Court held that such facts properly permitted an inference that assault was an increased likelihood. *Id.*

Here, the Stuters produced even more dramatic evidence of ratification. This was not a one time situation of criminal harassment. Here, year after year, Defendant Deputies affirmatively both told and showed teenagers that the only law enforcement response to their criminal harassment of the Plaintiffs would be Sheriff's deputies telling the teenagers to go home, breaking up their rallies at some point, or issuing traffic tickets. Under the *Dwares* ruling, such state action equates to reassurance that affirmative criminal conduct is not criminal. Such reassurances to persons engaged in trying to terrorize other citizens for or as a result of rights expression were here alleged to have resulted from either state complicity, or from intentional actions by the deputies via their openly stated belief to Plaintiff Lynn Stuter that such criminal behavior was free speech. The end result was ratification, and continuing escalating harassment of this family.

The Ninth Circuit's holdings in this case that, because criminally harassing activities predated any involvement by the department, then impliedly the department could not have created the danger, and its holding that the "record is devoid of evidence that any

affirmative action by the Department increased the danger posed to the Stuters," both fail to recognize that the entire theory behind, e.g. *Dwares* and *Freeman*, *supra*, is that "state created danger" arises when third party danger is clear, and where police are present and ratify the behavior, and thus inherently increase the danger to the citizen involved.

As well, one recognized touchstone behind the existence of an affirmative duty on the part of the state in "failure to act" liability is a person's inability to act for themselves. *See e.g. Kneipp v. Tedder,* 95 F.3d at 1209. In quelling criminal action against herself, Plaintiff Lynn Stuter did ultimately go into the street one night in anticipation of a predicted "road rally" with a shotgun and a car blockade, right in front of deputies, to try and dissuade the forming of the anticipated riot in front of her home. Plaintiff was thereupon promptly accosted by a Defendant sheriff's deputy, ordered off the roadway, and cited for criminal "disorderly conduct." Under such circumstances, a situation akin to the Third Circuit's *Kneipp v. Tedder* reasoning, and that of custodial cases, appears. Police limited Plaintiff's freedom to act on her own behalf, but would not protect her or her family from crimes against them either. *See e.g.* 95 F.3d at 1199. Under such circumstances, an affirmative duty to protect should arise. *See Wood v. Ostrander,* 879 F.2d 583 (9th Cir. 1989) *cert. den.* 498 U.S. 938 (1990).

The Ninth Circuit's decision in this case forecloses and abrogates the evolving line of "affirmative action" duty on the part of the state when third parties are actively and openly targeting person exercising free speech rights. This court should address this issue created by *DeShaney* and the subsequent conflict between this Ninth Circuit decision and the Second (and Eighth Circuit) as to how an affirmative

duty applies when citizens, exercising free speech rights, are under attack.

### 2. REVIEW IS WARRANTED TO ADDRESS THE NINTH CIRCUIT'S ABROGATION OF 42 U.S.C. § 1983 LIABILITY WHEN MUNICIPAL POLICIES OF INACTION, SUCH AS FAILURE TO TRAIN DEPUTIES PROPERLY, EVIDENCE DELIBERATE INDIFFERENCE TO CONSTITUTIONAL RIGHTS.

Another expressly established exception to the *DeShaney* rule is that of this Court's longstanding precedent regarding policies of inaction, whereby state policies of inaction amount to a failure to protect constitutional rights. *See Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978); *City of Canton v. Harris,* 489 U.S. 378 (1989).

Under *Monell,* and *City of Canton,* a local government entity can be liable under 42 U.S.C. § 1983 if it has a policy of inaction, such as failure to train police in deliberate indifference to the rights of persons with whom the police came into contact, and such inaction amounts to a failure to protect constitutional rights. *Canton,* 489 U.S. at 388-389; *Monell,* 436 U.S. 694. Such a custom or policy of inaction must be the result of a conscious or deliberate choice to follow a course of action made by an official or officials responsible for establishing final policy. *See Pembaur v. Cincinnati,* 475 U.S. 469, 483-484 (1986). As noted in *Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.,* 526 U.S. 629, 642 (1999), liability arises, not

from individuals acts, but rather, from "an official decision by the recipient not to remedy the violation." *Id.*, quoting *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 290 (1989).

Where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants, then such s shortcoming may be properly thought of as a city "policy or custom" that is actionable under § 1983. *City of Canton,* 489 U.S. at 389. Deliberate indifference to a person's constitutional rights occurs when the need for more or different action, "is so obvious, and the inadequacy [of the current procedure] so likely to result in the violation of constitutional rights, but the policy makers...can reasonably be said to have been deliberately indifferent to the need." *Lee v. City of Los Angeles*, 250 F.3d 668, 682 (9th Cir. 2001), citing *Oviatt v. Pearce,* 954 F.2d 1470, 1477-78 (9th Cir. 1992) quoting *City of Canton,* 489 U.S. at 390. Whether a local governmental entity has displayed a policy of deliberate indifference is generally a question for the jury. *Lee,* 250 F.3d at 682.

Here, the Ninth Circuit has cited *DeShaney* in upholding a decision that Plaintiff had failed to establish such a policy, because police interaction cannot constitute a policy. But under *City of Canton v. Harris,* inaction clearly can constitute a policy; here, inaction constituted not only an affirmative policy of non-enforcement of criminal law, but also evidenced failure to train deputies, amounting to deliberate indifference to the constitutional rights of citizens with whom those deputies predictably came into contact.

But moreover, evidence also exists that this policy became the requisite "moving force" behind the violations, (*see e.g. City of Canton,* 489 U.S. 389), in that law enforcement believed this criminal harassment to be "free speech." Neither the District court nor the Ninth Circuit commented on this evidence. But a law enforcement position--openly taken--towards persons engaged in criminal behavior, whereby the behavior is characterized as "free speech" which cannot be restricted, cannot help but ratify further violations by those inclined to violate. This is the *Dwares* recognition that people who assault others, without interference from law enforcement who are present and watching, will likely be emboldened to prolong or continue the assault.

Here, evidence supports not only an affirmative and openly stated policy in and of itself occurring over the years, but the indifference of Stevens County to its deputies' obvious invalid and erroneous inability to distinguish between criminal behavior and free speech over a period of years, while call upon call was made by Plaintiffs to law enforcement. Such resulted in the Defendant Department thereupon not only refusing to provide proper protection to Plaintiffs, but in the Department's affirmatively ratifying the criminal conduct against these Plaintiffs, and prolonging and increasing the danger of continuing harm to Plaintiffs.[3]

This Ninth Circuit's use of *DeShaney* to thus hold that law enforcement must be the direct actor who creates the violation, and that failure to enforce the law of necessity involves no action, and thus no policy or liability, effectively

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[3] The escalating incidents involved confirmed that harassment not only continued, but grew more severe as it evolved into a high school tradition.

abolishes or repeals this Supreme Court's *City of Canton* line of reasoning. State inaction in the form of failure to train law enforcement in deliberate indifference to constitutional rights should continue to constitute a policy which can violate constitutional rights, and thereby be actionable under 42 U.S.C. § 1983.

## CONCLUSION

The Ninth Circuit Court of Appeals found insufficient evidence to support a 42 USC § 1983 claim, because the legal standard applied by that Court for 42 USC § 1983 liability is erroneous. Upon acceptance of the theories discussed, more than sufficient evidence exists for Petitioners' claim. For the foregoing reasons, Petitioners request that this Supreme Court grant review.

Respectfully Submitted,

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